DOCUMENT RESUME

ED 138 181 HE 008 844

AUTHOR Barksdale, Milton Kendall
TITLE Graduate and Professional School Admissions: Social and Legal Considerations.
PUB DATE Apr 77
NOTE 43p.

EDRS PRICE MF-$0.83 HC-$2.06 Plus Postage.
DESCRIPTORS *Admission Criteria; Affirmative Action; Constitutional Law; Court Cases; Due Process; *Educational Discrimination; Females; Financial Support; *Graduate Study; Higher Education; *Legal Problems; Medical Schools; Nontraditional Students; Professional Education; Residence Requirements; *Reverse Discrimination; *Social Problems; Supreme Court Litigation
IDENTIFIERS *Access (Education); Bakke v Regents of University of California; Defunis v Odegaard; Education Amendments 1972 Title IX; Government School Relationship

ABSTRACT

In some respects, "discrimination" is at the heart of the college admission process, and in the selection of students for graduate or professional programs, the application of admittance criteria becomes a matter with potential moral and legal ramifications. The practice of setting aside specific places for less-prepared applicants (generally those who had suffered from discrimination and had received an inferior education) has resulted in denying access to other applicants with sufficient qualifications. The court cases of Marco Defunis and Allan Bakke, which challenge these admission policies and techniques, are discussed in this paper. Other cases are cited that are concerned with financial aid as well as admission criteria. The significance of litigation involving charges of discrimination and the attention given to the concept of due process is assessed. The ultimate effect cannot be known, but there will develop a greater concern for detailed records on the part of selection committees. The difficulty in maintaining a balance between the rights guaranteed to both minority and nonminority Americans is emphasized. (LBH)

GRADUATE AND PROFESSIONAL SCHOOL ADMISSIONS: SOCIAL AND LEGAL CONSIDERATIONS

Milton Kendall Barksdale

Assistant Professor

Eastern Kentucky University
Richmond, Kentucky 40475

April 1977

We want a qualified surgeon when we need an operation, yet there are quotas in medical schools--seats reserved for qualifiable students to be taken from more qualified applicants. We want a skilled lawyer when we are in trouble, yet there are quotas for candidates for law schools. . . .

The present use of quotas should not be permitted to mask the larger issue, the danger of a de facto system of quotas. Abolishing tests, especially IQ tests, eliminating examinations, bending entrance requirements (for college and employment), downgrading requirements for skills or eliminating them entirely, and denying quantitative measures of excellence are profoundly wrong and antiintellectual practices. We know these masking practices for what they are, and we are going to pay for them (Ornstein, 1976, p. 17).

It has been argued, with considerable merit, that quotas are not democratic, but that they must be retained on a temporary basis until the ills of our society can be remedied. The question therefore becomes not whether quotas are right or wrong but at what level particular quotas should be set, what the rate of change to achieve a particular goal should be, when they can be increased or even eliminated, and how much time must elapse before the situation will stabilize so that a particular quota will no longer be necessary. The most important aspect of the discussion on quotas is not the philosophical or legal principles but the particular procedures established and the personnel used for executing them (Fuerst, 1976, p. 21).

In order to redress past wrongs society has reduced the advantages of the more powerful and advantaged groups, and has thus created tension and controversy--hence the requirement of affirmative action in the employment of women and minority group members and in the allocation of money and other resources to increase their educational opportunity. Several principles are being applied. Past injustice must be righted, even at the cost of discomfort and inconvenience to the present generation which, while not responsible for the past injustice, profits from it. The groups which have been favored in the recent past must accept some reductions in the name of justice. The practical problem is how fast and how far these changes should be made (Havighurst, 1976, p. 25).

The decade of the 1970s is experiencing an uneasy equilibrium among three sets of rights--those of the individual, of heretofore disadvantaged groups, and of social institutions designed to serve a postindustrial society. Conflicts over rights become settled, balancing these three sets of rights. No one of them has been chosen for preference by American society (p. 28).

CONTENTS

GRADUATE AND PROFESSIONAL SCHOOL ADMISSIONS: SOCIAL AND LEGAL CONSIDERATIONS

Introduction

In some respects, "discrimination" is at the very heart of the college admission process. And, in the selection of students for graduate or professional programs, the application of admittance criteria becomes a matter with potential moral and legal ramifications. Because only a limited number of class openings are available in such professional schools as those of medicine and law, institutions of higher education have attempted to develop suitable means of determining the most qualified of the candidates for entrance. But how many can be accepted in light of increasing instructional costs? Who will decide--and for what reasons--that one person will be preferred over another? And does the preference extended for admission imply a similar consideration for graduation? Previously applied standards of evaluation have encountered serious criticism during the last decade: being at first considered barriers to the progress of minorities and women, then later as methods of imposing quotas leading to "invidious reverse discrimination" against white males.

Motivated by a sense of obligation to expand educational opportunities for all segments of society, university administrators who sought alternatives to more traditional admission procedures soon realized the difficulties involved. To ensure that an adequate provision was made for less prepared students (generally those who had suffered from discrimination and had received an inferior education), admissions committees adjusted numerous requirements and set aside specific places for those applicants who were to be regarded as "special." In so doing, however, certain others were denied access to graduate or professional education although their qualifications appeared to be sufficient. Their challenges to existing admission policies and techniques have reached the courts, notably the cases of Marco DeFunis and Allan Bakke; while the former case was declared moot by the U.S. Supreme Court, the latter awaits a hearing during the 1977-78 terms of the Court.

Graduate and Professional Admissions

Even though graduate school enrollment has shown a decline of over two percent in 1976, according to the Council of Graduate Schools, professional schools are still operating at record levels of class size. And the tremendous demand for admittance to medical and legal education has continued to grow: Daniel Greenberg (1977) has reported in The Chronicle of Higher Education that, despite the fact that medical school enrollment in the United States stands at 57,000 today as compared to 33,000 in 1968, first-year applicants are being rejected at a rate of approximately 65 percent. Less than one-half of those who reapply are accepted. So intense is the competition for medical degrees, writes Greenberg, that thousands of rejected applicants are entering foreign institutions for training--with the hope of one day returning to an American university. To facilitate this process, Congress passed the Health Professions Educational Assistance Act of 1976 which would compel U.S. medical schools to welcome those who had studied abroad, if their qualifications were adequate; refusal to do so would result in financial penalization of the universities. The turmoil which this law has caused to date centers around its obvious threat to institutional autonomy in the setting of admissions standards. For the moment, however, its implementation has been delayed and attempts are being made to render it impotent.

The bulging enrollments of medical schools have not had a detrimental effect on the market for physicians; the same cannot be said, though, about other fields. Already a glut exists in many subject areas for Ph.D.s who wish to teach. Mike Meuser (1977) has recited a potentially similar case for lawyers, who by the year 2000 may experience a greatly overcrowded profession. Opportunities which were once available to the attorney are becoming more limited. Much the same can be said for a number of professional endeavors.

All of this pessimism would seem to suggest the necessity of a severe curtailment in accepting prospective students. Harold Orlans (1975) has spoken of

"the fatuity of credentialing everyone and everything" and of the questionable trend of equating certification with competence. While "the case against limiting enrollment in teacher education" (Newman and Slagle, 1976) has been argued in the Phi Delta Kappan, the question remains of whether or not "students should have freedom of access to any program in the public universities, irrespective of difficulties in completing it or in getting a job" (p. 709). Terry Herndon (1976) has voiced his opposition to this conception of "academic freedom," calling it naive in assuming the lack of admissions standards and a cruel hoax in maintaining the student's freedom to pursue a career which may have no future.

Addressing the same issue, Howard Bowen (1974) has described higher education as a "growth industry" having considerable ability to respond to the changing economy. Since manpower needs cannot be absolutely predicted, unwise limitations on enrollments may be counterproductive. In addition, three moral issues are present: (1) the freedom of personal choice in selecting areas of study; (2) the value of education beyond the acquisition of vocational skills; (3) the importance of the directing of technology by educated "people of vision and sensitivity." "The limits of education are set," reasons Bowen, "not by the dimensions of the jobs we see around us but by the capacity of human beings to learn." Further, ". . . education would touch people of all backgrounds and aspirations and its content would encompass all aspects of life" (p. 157).

To yet another advocate of the importance of graduate-level education, the market approach to program maintenance can lead to difficulty. John Millett (1974), however, has expressed the view that in an era of dwindling resources graduate education must lead to instrumental accomplishment as well as intellectual satisfaction and development. More students will, of necessity, be attending institutions part time to receive advanced degrees; effort will be expended on more "practical" projects. Above all else, though, will be a general revitalization of post-baccalaureate study, from the admissions process to the final certification.

In most American universities, committees designated by the president, the faculty governing body, or the academic departments themselves meet to evaluate the credentials of applicants. Usually the composition of these bodies is such that differing viewpoints are represented; several minority group members (either faculty or students) are now frequently added for balance.

Those who are confronted with the arduous task of selecting students for graduate or professional education generally seek suitable guidelines to facilitate the process. Throughout the period immediately following the emergence of the first true graduate school at Johns Hopkins University in 1876, several factors influenced most admissions decisions: merit, financial well-being, and social standing. And, in actuality, the situation has not changed greatly over the last century. (What changed, according to John Duffy (1976, pp. 260-90), was that entrance requirements became considerably more stringent over the years: for example, not even a high school diploma was demanded of candidates by many medical schools in the 1800s. It was at Johns Hopkins in 1893 that the requirements of a college degree and a knowledge of French and German set the precedent for the identification of qualified applicants. Also during this time, the National Association of Medical Colleges began to expect member schools to administer examinations for admittance. Abraham Flexner's indictment of medical education, published in 1910, further influenced the profession to move toward higher standards. Interestingly enough, women--who had been admitted to major medical colleges such as Syracuse (1870) and Michigan (1871)--were being systematically excluded by entrance policies, so that the number of female physicians actually decreased during the early 1900s.)

Intelligence, as measured by standardized admission tests (for example, those in the fields of medicince, law, and business, as well as the Graduate Record Examination) and the undergraduate grade point average, remains the single most important criterion for class selection. But, especially for those in professional studies, an emphasis

on the applicant's perseverance and leadership potential is not uncommon. While difficult to assess with any degree of accuracy, the potential for "future success and outstanding contributions" in the chosen profession is usually evaluated through committee intuition. Robert O'Neil (1975) believes that advocates of preferential admissions policies can make considerable use of this conception: although perhaps lacking in the quantifiable measures of ability, the minority applicant may become a greater force for societal improvement than a nonminority person. Justice Douglas, however, sought to refute this argument in his dissent in the DeFunis (1974) case. In his view, the need for capable lawyers is substantial--regardless of their race; black lawyers, for instance, are not necessarily required by black clients. Another expression of concern was articulated in the New England Journal of Medicine by Bernard Davis (1976): "It seems time for medical faculties to ask whether we have been properly balancing our obligation to promote social justice with our primary obligation to protect the public interest, in an area in which the public cannot protect itself" (p. 1119).

(Recently, controversy over the remarks of Health, Education and Welfare Secretary Joseph Califano led to his subsequent statement of clarification ("Califano admits error," 1977). Califano had advocated preferential hiring and admissions policies for minorities and women--in effect, quotas--to reverse long-practiced discrimination. But the resulting outcry from educators prompted his change to the more moderate view of recommending special training courses and intensive recruitment.

A second factor, the ability to pay, has had a way of opening up positions in graduate schools across America. At the turn of the century, those with the financial resources to support themselves (and often the program itself) were granted admission rather quickly. The reasons were indeed pragmatic: without operating funds no prospective scholars could receive educational benefits. What harm would be done by admitting a less than bright applicant if an endowment to the campus was forthcoming

upon his graduation? Such "subjective" standards continue to be utilized with justification by committees, perhaps, but a trend toward "ascertainable" criteria is growing. Yet another significant effect on professional school admissions is that of scholarship and fellowship availability. These grants of money to sustain candidates for degrees control the academic program to a rather great extent. Without funds, fewer students may enroll, resulting in the curtailment of course offerings and research opportunities. The desirability, therefore, of finding students who already possess grants or who will merit them is readily apparent to admissions officers.

Among the groups which are especially likely to receive federal funds for education are those characterized as minorities (black, Spanish-surnamed Americans, American Indians) and women. And the advent of affirmative action programs has given additional impetus to the demand for increased opportunities in higher education for these previously disadvantaged persons. The birth of this concept can be traced back as far as Franklin D. Roosevelt's anti-discrimination order for wartime weapons plants; but the first use of the phrase "affirmative action" was Kennedy's Executive Order 10925. Under Johnson, though, the full program associated with the term came into being with Executive Order 11246 of 1965.

And, although a specific part of the 1964 Civil Rights Act provided (Title VII, Section 703) that preferential treatment is not required to correct racial imbalances in occupational groups, the federal executive actions have perhaps taken precedence over the original legislation (Glazer, 1975, pp. 44-46). Moreover, the judicial interpretations of the laws of Congress and of the mandates of the administrative agencies has further modified the application of the basic principle. Even the Carnegie Council on Policy Studies in Higher Education ("The Carnegie Council," 1976) issued a statement in August of 1975 calling federal affirmative action programs confused and chaotic. The Council has recommended special programs to

improve the abilities of the disadvantaged but has also observed that the most qualified candidates should be selected without regard to sex or race. Nevertheless, institutions, in the spirit of affirmative action, must be required to "pursue nondiscriminatory policies and to maintain relevant records that will be available on request" (p. 8).

Since the late 1960s, the role of women in graduate and professional education has become more prominent. Title IX of the Educational Amendments of 1972 specifically prohibits sex discrimination in admissions policies for both graduate and professional schools. Overt quotas which limit the number of women applicants, "ostensibly fair procedures which have a discriminatory effect," and seemingly fair criteria which are actually sex-biased--all are in violation of the existing law. Since both public and private institutions which receive federal monies in grants, loans, or student aid are included, virtually no exemption is possible (Sandler, 1975). Furthermore, the implications of the Equal Rights Amendment, should it be ratified, will be significant throughout higher education. It would seem that even in the area of admissions the impact will be substantial: although much of the discrimination of the past has disappeared and women are accepted as being genuinely interested in the professions, selection committees are still subject to bias against women, especially mothers (Roberts, 1973).

Admissions decisions are also affected by applicant characteristics, other than race or sex, which are sometimes overlooked. Place of residence has historically been a factor in the selection processes of many schools. In a number of cases, preference for the in-state applicants is required by state statute. Tennessee, for example, is especially strict in this regard. Even though the parochialism associated with an overwhelming majority of "local" students is frequently criticized, institutions have still tended to select "known quantities" rather than incur the wrath of a displeased public. Recent Supreme Court decisions, too, have reenforced

a state's right to discriminate on the basis of personal residence. Not challenged, at least for the present, is the university's right to give preference to those returning from military service. Special consideration has been given veterans for some time (notably in the "G.I. Bill"); but the issue was not raised in DeFunis, although the University of Washington had shown favoritism toward this group. Lastly, a variety of other influential factors have had at least some bearing in committee recommendations: religion (particularly in the early 1900s), personality, and alumni or political pressure on behalf of an applicant.

Relevant Points of Law

Certain cases and points of law seem to reoccur in briefs relating to admissions questions. The first of these concerns the nature of higher education itself: is it a right or a privilege? While the definitive answer does not yet exist, guidance can be found in the Healy v. James (1972) decision in which the Court held the First Amendment rights of a campus dissident group could not be denied by administrators. However, Gellhorn and Hornby (1974, p. 998) have observed that, although higher education is now subject to constitutional scrutiny (a demise of the right-privilege distinction), "the constitutional rights of a citizen are not necessarily carried unmodified through the campus gates." Further, "in determining what procedures are required in the admissions process, then, the courts will consider the impact of those procedures on the educational environment" (p. 999). In a previous ruling, Starns v. Malkerson (1971), the Court stated that, while higher education is of great value, it cannot be equated with food, clothing, shelter, or rights of a fundamental nature. Thus, a difference remains--although not to the degree it once was. As the high school diploma before it, the college degree could be considered a necessity. Even here, though, uncertainty exists: in Griggs v. Duke Power Company (1971), the validity of requiring possession of a high school diploma by a worker was called into question.

Whenever an appeal is made in a case involving denial of admission, invariably Fourteenth Amendment rights are mentioned. Designed to ensure that former slaves could become citizens with basic civil rights, this Amendment to the Constitution was proposed in 1866 and proclaimed in 1868. Its due process and equal protection clauses have had significant impact in the years since their statement: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." By specifically mentioning the state, the Amendment directs the state to provide the rights listed in the due process clause of the Fifth Amendment, which relates the federal government's responsibilities.

It is wise to differentiate between "procedural" and "substantive" due process. Concisely (Hobbs, 1976), "'procedural' due process . . . concerns the fairness of the steps that are taken in the adjudication of a dispute or in the application of a sanction." In contrast to this, "substantive due process . . . speaks of the reasonableness, the relatedness, of the criteria used in reaching a determination in the case" (p. 108). As Hobbs has noted, the attacks on affirmative action programs and admissions procedures frequently utilize the due process clause in maintaining that protection guarantees have been violated through the application of legally impermissible criteria.

For higher education and its relationship to the Fourteenth Amendment, two cases in particular should be mentioned. Dixon v. Alabama State Board of Education (1961) represented a truly noteworthy point in the application of the due process principle. The Fifth Circuit Court recognized that state-supported educational institutions are subject to the constitutional requirements of the Fourteenth Amendment; specifically, a statement of charges or reasons for the college's action should be given to the parties involved and the opportunity for a hearing should be made available. Even though this decision related to an instance in which

the civil rights of black students were infringed because of their protest demonstration the judicial treatment of those dismissed served as a model in cases concerning the deprivation of a "valuable personal interest." Gellhorn and Hornby (1974) have remarked that the Dixon guidelines for school officials have become almost universally followed as the minimum expected--although the Supreme Court itself did not make the ruling.

The second case which directly relates to due process in the academe is that of Roth v. Board of Regents (1972). Roth, a nontenured professor who had not been rehired, filed suit in order to return to his position. But, according to Hornby (1975), "constitutional protection under the due process clause is, by its terms, extended only to those deprived of 'life, liberty, or property'" (p. 223). In the Court's opinion, these conditions were not deemed to be present; hence, Roth did not succeed in his case. There exists, it would appear, a threshold of property interest which is subject to interpretation. The applicability to admissions issues rests, then, on these grounds: ". . . for the Court defined property in terms of justified expectation rather than possession and recognized that a person's liberty is affected by a severe restriction of his alternatives" (p. 223).

Similar difficulties in analysis are possible in an examination of the equal protection clause as well. Interestingly enough, while the clause was designed to end various forms of racial discrimination against the freed slaves, the initial use of importance was in protecting the rights of Chinese laundrymen in California (O'Neil, 1975, p. 71). Over the years, it has been invoked in numerous cases, notably in Harlan's dissent in Plessy v. Ferguson (1896) and in Brown v. Board of Education (1954), to secure the rights of minorities in society.

Criticized by some, lauded by others, the ever-increasing application of the due process and equal protection concepts is changing institutional policies. Ascertainable standards, fair and open practices, proper and sufficient opportunities

have become watchwords for administrators. Although undue optimism is not suggested, one writer has offered this encouragement:

> "Due process of law," that elusive legal concept which has come to insure some degree of fairness in student-university relationships, has not yet stifled the academic process. To the contrary, it may even prove to be a device by which new vitality and meaning are introduced into relationships among faculty members, administrators, and students (Caldwell, 1970, p. 265).

An investigation of the constitutionality of such university programs as preferential admissions requires an understanding of the appropriate standards. To scholars of constitutional law, such as Robert O'Neil (1975), three options or tests exist in the application of the Fourteenth Amendment to discrimination cases: (1) the Per Se, (2) the Rational Basis, (3) the Compelling State Interest.

The Harlan opinion in the Plessy case is an example of applying the per se test to a racial question. Justice Harlan adamantly stated that "the Constitution is color blind" and that the Fourteenth Amendment's protection precludes use of race to differentiate between people in determining benefits, rights, or privileges. In other words, racial classifications are per se invalid and unconstitutional. Here lies the fundamental argument of most attacks on "reverse discrimination" and preferential admissions policies.

Can race be considered a valid criterion when it is used benignly? Or can it never be constitutionally employed to separate persons? No answer is possible at this time as recent Court decisions have not been conclusive. On the one hand, a staunch supporter of preferential programs, Hunter Boylan (1973), has maintained that the precedents established by the Court in promoting school integration "indicate that the law recognizes a duty to overcome the effects of previous discrimination as clearly as it recognizes the responsibility to avoid present acts of discrimination" (p. 174). According to Boylan, guidelines should be forthcoming which will rectify the present condition of uncertainty. But, on the other hand,

of the critics of special treatment for certain groups, none has been more outspoken than Carl Cohen (1975) who believes that such practices would eventually destroy the principles of constitutional government. In his opinion, "preference by race is malign; its malignity has no clearer or more fitting name than racism. Widespread in American universities, this well-meant racism will indeed be found, upon reflection, to deny the equal protection of the laws" (p. 141).

The second test stands as the opposite of the first. Its supporters maintain that the Constitution does not prohibit classifications is there is any "rational basis" given by the state for them. All that is necessary is that some logic for the law or procedure be demonstrated--however superficial or unusual the rationale may appear. If the state believes the public interest is served by "positive" discrimination between racial groups, then it is permissible under the Fourteenth Amendment--or so the argument goes. The "rational basis" test has been applied in welfare cases, in advertising disputes, and in other expressions of societal concern for human well-being. But this standard must not be used unless it is absolutely certain that no harm will result: "Governmental power to classify on the basis of race is dangerous. Today's minority may become tomorrow's majority and vice versa" (O'Neil, 1974, p. 933).

Of the three approaches to the issue, the last is receiving the most attention. Whenever the state can adequately prove that a "compelling interest" motivates its actions, it then can establish a reasonable course to follow. As to what could be shown to be "compelling" remains in doubt; O'Neil (1975, p. 86) has observed that the Supreme Court has yet to declare that a classification meets the requirements. The time for such a ruling is fast approaching, however, for in the case of Vlandis v. Kline (1973), the Court indicated that the state has a legitimate interest in using residence as a factor in tuition assessment.

How can the idea of "compelling interest" be incorporated into a defense of

preferential admissions? O'Neil (1975, pp. 88-90) has supplied the details: (1) Ensure that the classification scheme is acceptable under the Fourteenth Amendment. Equal protection must exist for all, although consideration can be taken of past injustices which necessitate corrective actions. (2) The interest of the state and its citizens must be of prime importance. Financial concerns can be of significance; and clearly the educational programs must show benefit from the classification process. (3) The relationship between the scheme of classification and the state's interest should be shown without question to be thoroughly "rational." If race is the criterion for judging, why is it so used? This must be proven to the satisfaction of the courts. (4) The results desired by the state can be obtained by no other means. The goal of increasing the number of minority members in the legal or medical professions (or women in these areas, for that matter) can be met only by specifying that a particular number of applicants will be of a certain race or sex. Universities and governmental agencies are, consequently, themselves "compelled" to produce evidence which will verify the preceding statement.

Cases of Note: DeFunis, Bakke, et al.

DeFunis v. Odegaard (1974): Among the pertinent cases of the past which have had a bearing on arguments in DeFunis are the following: in Plessy v. Ferguson (1896) the Supreme Court stated the "separate but equal" doctrine in allowing segregation of public facilities for promotion of the general good, leading to Justice Harlan's dissent that "our Constitution is color blind, and neither knows nor tolerates classes among citizens"; in McLaurin v. Oklahoma State Regents (1950) the Court, with Vinson as Chief Justice, ruled that segregated classroom and study facilities impaired the ability of a black graduate student to pursue his profession; in Sweatt v. Painter (1950) the Court went beyond the physical facilities argument and declared the Texas Negro Law School inferior to the Texas Law School in "those qualities incapable of objective measurement," including traditions and prestige;

in Brown v. Board of Education of Topeka (1954), the landmark case in education, the Warren Court declared that segregated education and the resulting discrimination deprived minority persons of equal protection under the law and that "in public education the doctrine of separate but equal has no place."

Horle and Thompson (1968) have described the effect of the 1954 decision on admissions policies, suggesting that most cases can be judged on whether the equal protection guarantees have been observed by institutions. (Two unusual rulings have been given in their discussion: in 1958 and 1960 it was held by Texas courts that "sex as a basis for legal legislative classification was constitutional" and ruled that a woman plaintiff's denial of admission was not a violation of her Fourteenth Amendment rights.) The road to DeFunis is marked by numerous other decisions of significance; nevertheless, it alone

> . . . provided the first opportunity for an explicit statement on whether, under the equal protection clause of the Fourteenth Amendment, race can be taken into account voluntarily by a state when previous discrimination has not been proved (Hornby, 1975, p. 217).

It has been this case, more than any other in recent memory, which has captured the attention of educators in graduate and professional schools. Perhaps this is so because a school of law itself figures prominently and because a constitutional question of considerable import is deeply involved. At the root of the controversy lies the University of Washington Law School's denial of admission in 1971 to Marco DeFunis, a magna cum laude graduate of the University and a resident of the state. Although he was subsequently offered admission to four other law schools, DeFunis chose to contest his rejection by the school he preferred for reasons of location and reputation. It was not that the University of Washington found him totally unqualified, rather that it had but 150 first year openings and 1601 applicants in the fall of 1971--the trend toward increased social concern as well as the hope of economic success had made the study of law exceedingly popular.

Although DeFunis had an undergraduate grade point average of 3.62 (3.71 in his junior and senior years), his initial score on the Law School Admission Test was not outstanding; he took the test three times, however, making 668 on the last attempt. This score placed him in the upper seven percent of those completing the test nationally, but--and this is crucial--his three scores were averaged, thus reducing his overall standing. While O'Neil (1975, p. 9) has affirmed this technique as standard, several others in the legal profession saw fit to disagree in their briefs to the Court. (A critique of the LSAT was included in the dissent of Justice Douglas (DeFunis, p. 1719): the test, in his view, reflects a definite slant toward the "traditional" applicant, usually white and upper middle class. He has proposed the invention of other measures which would take into account personal background, perception, and group compatibility; "a law school," he has asserted, "is not bound by any legal principle to admit students by mechanical criteria which are insensitive to the potential of such an applicant which may be realized in a more hospitable environment" (p. 1719).)

Using his adjusted LSAT score, GPA, and writing test results, the law school's admissions committee calculated a predicted first-year average of 76.23 for DeFunis. Since an average had been prepared for each applicant, the selection process consisted first of grouping by score and then of inviting the applicants for interviews according to rank. Those who had left the program because of military service were allowed to reenter, decreasing the available class positions. For the fall term, 275 applicants were accepted with 55 additional persons noted as alternates; DeFunis was not placed in either category, even though 180 students had lower grade point averages (and no graduate work in political science as he had done). In addition, 44 of the 275 persons admitted were minorities, 36 of whom had predicted law school grade averages significantly lower than that of DeFunis; 48 nonminority applicants with lower averages were admitted, 23 of these returning veterans.

What had occurred, DeFunis learned, was that whenever an application form indicated a minority person this request for admittance was given to a special subcommittee. Regardless of their test scores, these applicants were considered for preference based on their potential contributions to the school and the profession because of their race (usually black). Unfortunately for the institution, methods of record-keeping were poorly organized; DeFunis had the opportunity to make a strong case on several points, including procedure and equal protection.

Two weeks after his last refusal of admission, DeFunis instructed his attorney to file suit for his admittance to the law school and for damages against Charles Odegaard and others representing the University of Washington. (According to Karin Abarbanel (1976, p. 27), Dr. Odegaard, retired president of the University, is currently preparing a comprehensive study for the Macy Foundation on the efforts of 40 medical schools to increase the enrollment of minority students.) Believing that he had been discriminated against because of his not being a minority student, DeFunis sought to prove the unconstitutionality of the committee's actions. His Jewish background was to be cited in many arguments, for it had been this ethnic group which had suffered much over the years in higher education. Indeed, as John Duffy (1976, pp. 289-90) has observed, in the medical schools many universities used subterfuge to limit the number of Jewish students; Harvard in 1919, for example, placed a quota on Jews to maintain "a proper balance."

The case of DeFunis v. Odegaard next went to the Superior Court in Seattle and the discussion continued:

> When Judge Shorett found the DeFunis case on his docket, he went to the law books in search of precedent. He quickly discovered there was no Supreme Court decision in point. The absence of constitutional guidance was surprising, for the issue had been much discussed in the press and in law journals (O'Neil, 1975, p. 71).

In this "case of first impression," Shorett ruled for the plaintiff DeFunis. Having been previously allowed to enter the law school by court order, DeFunis

continued to attend classes as the University appealed. After a lengthy study, the Washington Supreme Court issued its opinion in favor of the institution. It ruled as follows: DeFunis indeed had "standing," a personal stake in the outcome of the actions; consideration of race in admissions was not a per se violation of the equal protection clause; the law school had to prove a compelling interest for its policies; the efforts made on behalf of minorities were not unconstitutional; no reason existed for the plaintiff to request consideration because of his residence in the state. DeFunis, logically, sought relief from this judgment; Justice Douglas granted a stay, pending Supreme Court review.

The Supreme Court decision, by a five to four vote on April 23, 1974, was somewhat unexpected: the case was declared moot because DeFunis had nearly completed his course of study. Justices Douglas and Brennan strongly disagreed with the opinion, both advocating an answer be provided for the issues raised. Perhaps, as some have commented, the Court "ducks" hard cases; Posner (1975), though, has noted that the judgment of mootness was much more reasonable than Brennan's criticism of it. Hobbs (1976) has written that it was most fortunate that a hasty decision was not reached on such a poorly prepared case; Kirp and Yudof (1974) have concluded that the non-decision was perhaps a blessing since it allowed institutions to continue to use discretion, an occasion "when the Supreme Court is wise not to exercise its prerogative to have the final word concerning the constitutional merits of a policy . . ." (p. 26). But the problems introduced were not put to rest: the 64 organizations which sponsored 26 "friend of the court" briefs on DeFunis testify to the concern of minorities, labor unions, professional societies, businesses, and schools.

Writing in the Virginia Law Review, O'Neil (1974, pp. 942-48) has attempted to substantiate a government's--or university's--reasons for granting preference on racial grounds: (1) increasing minority involvement on the campus and in the

professions; (2) reducing the effect of discriminatory entrance examinations and traditional standards of admission; (3) atoning for past injustices to minorities; (4) meeting the requirements demanded by affirmative action legislation and guidelines; (5) providing a more typical model of a multi-racial society in the professional school.

While not directly replying to O'Neil, Richard Posner (1975, pp. 7-19) has taken issue with similar justifications of reverse discrimination. His analysis is as follows: (1) there is simply no basis for the contention that standard admissions predictors are invalid for minorities; (2) the racial composition of the student body is not a factor in promoting real diversity--races are difficult to determine with precision, whereas a knowledge of socioeconomic levels would be useful in choosing students; (3) in many cases, previous discrimination against minorities on the part of the institution has not proven, eliminating the necessity of remediation; (4) no evidence is to be found that by increasing the number of minority professionals the problems of disadvantaged groups will be significantly reduced, for even the "role model" rationale is of doubtful validity.

Posner has concluded that institutions have turned to such admissions methods as those used by the University of Washington primarily to appease a small--but vocal--group of dissatisfied students and faculty. Rather than being motivated by the desire for diversity and justice, administrators followed the easiest way to reduce the pressure of affirmative action: establishing arbitrary quotas with a questionable racial categorization imposed by biased committees. A harsh judgment, perhaps, in light of the history of minorities--especially blacks--in America.

(Prejudice with its effect on educational opportunity has surely contributed, for example, to the deplorable lack of black physicians. Although several freed slaves were able to take their degrees abroad in such schools as the University of Glasgow, few were even admitted to Northern institutions. Howard University in

Washington, D.C., became the first real chance for blacks to receive medical education after its opening in 1867. By the early 1900s, several additional schools had been founded, but only one--Meharry in Nashville--was able to survive this period of financial stress. As late as 1942, there were but 3810 black physicians in America; years earlier, in 1910, the number had been 3409. The gain was slight, to say the least; blacks would not be regularly accepted as doctors until the civil rights movement of the 1960s (Duffy, 1976, pp. 284-88).)

One aspect of DeFunis which has been often neglected regards his initial claim to preferential treatment because of his status as a Washington resident. Statutory provisions in this particular state do not provide for favored admission to institutions for residents/taxpayers. As is the case in most universities, though, a higher fee is assessed nonresident students. A great irony of DeFunis is the dual nature of his plea, advocating certain types of "discrimination" (place of residence) but not others (race). This issue was effectively eliminated by the trial and state courts; it was not a factor in briefs to the Supreme Court (Hobbs, 1976, p. 110).

Before disposing of it altogether, however, the residence criterion may be worth additional attention. Since a state's taxpayers contribute greatly to its higher educational programs, they and their children should be given "first refusal" on admittance to state institutions--according to one viewpoint. The opposing opinion would take note of the important role of federal financing and would assert the right of American citizens to attend any public school for which they were qualified, space permitting. At least three cases of interest relate to the problem (Hanson and Liethen, 1974): in Shapiro v. Thompson (1969) the Court held that a state one-year durational residency requirement for welfare payments was unconstitutional since it unreasonably burdened the right of interstate travel and deprived individuals of basic rights; in Starns v. Malkerson (1971) a Federal court rejected a Shapiro-based claim that nonresident tuition interfered with the right

to interstate travel, observing that higher education is not a fundamental right and that a rational basis exists for higher fees for nonresident students; in Vlandis v. Kline (1973) the Supreme Court ruled that states may establish reasonable criteria to determine in-state status for tuition purposes but also that due process must be heeded by allowing students to become residents if requirements are met. For the present, therefore, decisions have been directed at tuition differentials, not at residency as a condition for admission to university programs.

Bakke v. the Regents of the University of California (1976): After the DeFunis case was declared moot, university administrators began to await the next strong challenge to "affirmative discrimination," which Bakke has proven to be (Wong, 1976). Allan Bakke, a white engineer, was denied admission to the Medical School of the University of California at Davis in both 1973 and 1974. Because of the tremendous demand for admittance (2644 applicants in 1973, 3737 in 1974), the selection committee was faced with rejecting most of those who applied. One hundred openings were all that were available each year; 16 of these were to be reserved for qualified minority students who had experienced--by reason of their race--the effects of indirect discrimination. Bakke maintained that his qualifications (a grade point average of 3.51, MCAT subtest percentiles of 96, 94, 97, and 72, a combined rating of 468 out of 500 in 1973 and 549 out of 600 in 1974) were, in reality, superior to those of many of the minority students chosen. His record was recognized to the extent that he was invited for interviews; nonetheless, he was not accepted although a number of minority applicants with much lower ratings were admitted.

To reverse the committee's decision, Bakke filed suit in June of 1974, claiming that the University had violated his equal protection rights by denying his admission on the grounds of race. Fearing an unfavorable result, the University filed a cross complaint for declaratory relief. In its opinion of September, 1976, the California Supreme Court stated that deprivation based on race is not subject to

a less demanding standard of review under the Fourteenth Amendment merely because the race discriminated against is the majority rather than the minority (Bakke, pp. 680-82). Furthermore, the court observed that the University had not demonstrated a "compelling" interest in the program by reason of past injustices to minorities by the institution and that the medical school had not shown that its goals could not be met in other ways.

Dissenting from the majority view, Justice Tobriner maintained that preferential admissions policies should be constitutionally permissible because they mitigate the violations of minority rights which culturally biased tests and inferior schooling have caused. Consideration of race is vital, in his opinion, to ensure "a diverse student body, a desegregated profession, an integrated society."

When the University appealed the California ruling (Bakke's admission has been stayed for the present), the feeling among minority rights organizations was that the Davis medical school had prepared a "bad" case, actually hoping to lose. The Chronicle of Higher Education (Watkins, 1977) has featured the growing uproar associated with the case. The positive statements of Davis President Saxon notwithstanding, the prevailing attitude on campus has been that the defense of minority admissions has not been competent. According to this recent report, fewer minority--black and Mexican-American--students are requesting admission to the University's graduate and professional programs. One law student has commented that the California ruling in Bakke ". . . can and will be used to maintain the status quo of traditionally white male medical and legal professionals" (p. 4). But the case, others have suggested, may offer an excellent opportunity to reexamine and improve access for all disadvantaged groups.

It now appears that Bakke will be argued before the Supreme Court during either the fall 1977 or the spring 1978 term. A former Solicitor General who is presently a Harvard law professor, Archibald Cox, has been selected to assist the University's

attorneys. Responsible for a brief supporting preferential admissions in DeFunis, Cox is expected to stress the "distinctive contribution to the profession" and the "diversity of backgrounds" reasons for special programs. This viewpoint has been presented by the president of Harvard, Derek Bok, on television's "Meet the Press." Commenting at length on the case, Bok stated that the courts err whenever they say race is not relevant in professional school admissions. Institutions, he concluded, must determine for themselves the nature of their minority student programs; further, "judges, good as they are, do not have intimate, firsthand experience in the nuances and subtleties of the admissions process, and therefore should not impose rigid requirements on minority admissions" ("Harvard President," 1977, p. 515).

As to the probable verdict, pertinent decisions of the Supreme Court under Burger have not been extremely predictable: in Griggs v. Duke Power Company (1971) uniformly applied standards--culturally biased tests, diplomas--were declared discriminatory and illegal, if they disproportionally affect minorities and they cannot be proven to indicate factors essential to occupational tasks; in Albemarle Paper v. Moody (1975) standards for employment were rejected unless thorough criterion validation of all required tests was accomplished, lest policies penalize minorities; in Washington v. Davis (1976), however, a police department test of ability was ruled acceptable even though four times the number of blacks failed it as whites. But the last decision cannot be taken, according to Malcolm Sherman (1976), as proof that the Court has abandoned its "anti-intellectual, pro civil rights" stand on issues of valid employment (and admission) standards. Washington involved a federal agency not subject to the 1964 Civil Rights Act at the time of the original trial; hence, the Supreme Court stated that constitutional requirements of equal protection in employment were not applicable in the manner indicated by the Civil Rights Act. But the recently extended coverage of the Act would suggest that criteria in conflict with the Court's concept of "fair and

non-discriminatory" practices will remain suspect. "Whether one likes it or not," Sherman has written, "intellectual values and standards and internal policies of institutions have been labeled as civil rights issues over which courts and government agencies have acquired significant jurisdiction" (p. 40).

An opinion announced March 1, 1977, by the Supreme Court may provide additional insight: in United Jewish Organizations v. Carey (1977) the use of quotas and the assignment of electoral districts solely on the basis of race to better reapportion an area were deemed permissible. Racial awareness is legislative reapportionment is not unconstitutional per se. Moreover, the use of racial criteria is not confined to eliminating the effects of past discriminatory districting; the requirements of the Voting Rights Act demand corrective action as necessary. In this instance, those who charged "reverse discrimination"--the members of the Hasidic Jewish community in New York--did not receive relief; a similar judgment could well be rendered in Bakke, though education--not redistricting--is the question.

Not all of the problems which have arisen in the development of minority admissions programs are of the same nature: Bakke's contention is somewhat different from that of DeFunis. Another student at California-Davis, Glenn De Ronde, has charged the University with bias in not permitting him to enter the law school ("Reverse Discrimination," 1975). Accusing the committee of rejecting him because of both his race and sex, De Ronde has requested proof of his lack of qualifications and has asked for admission, pending the Bakke decision.

Yet another case is that of Philip Di Leo who is currently attempting to enter the University of Colorado Law School under the provisions of its special admissions plan (Jacobson, 1977). Di Leo sees nothing wrong with the extention of preferance to "disadvantaged" students--indeed, he maintains that his own background justifies his qualifying as a special applicant. But the rub is that he an Italian-American and not one of the minorities designated by the University. In seeking an order that

he be admitted, Di Leo emphasizes that such programs should not exclude persons on purely racial grounds as this is a violation of the equal protection rights provided under the Fourteenth Amendment.

To counter this argument, the University of Colorado is preparing a brief which will stress the constitutionality of the program and the necessity of administrative discretion in determining the beneficiaries of special treatment. The under-representation of the specified groups in society, note university officials, is one strong reason for such selectivity in choosing from the large pool of "disadvantaged" applicants. For Di Leo to receive a favorable ruling would require that the University's special admissions programs be found constitutional only when the criterion of race is not considered by the admitting committee.

It is apparent that each challenge to admissions procedures will be, as Posner (1975) has said, different in some particular and important aspect from DeFunis: a comprehensive decision could not have been reached at that time although some guidance should have been provided.

Implications for Higher Education

The significance of litigation involving charges of discrimination and the attention given to the concept of due process is becoming increasingly evident to university administrators. Although the eventual outcome of Bakke remains in doubt, several conclusions as to the proper course of action by school officials can be drawn. A more thorough approach to "routine" admissions problems is definitely required--concern for correct procedure and proper documentation becomes mandatory. But before analyzing the particular actions suggested by recent court decisions, one should take notice of other interesting phenomena in higher education which relate to the issues at hand.

The tremendous force of what has been called the "consumer protection movement" is reaching the campus, affecting undergraduate, graduate, and professional programs.

Joan Stark (1976) has commented that consumerism is very much a part of the academic world, partly because of the new clientele in higher education (who are more socially and economically concerned) and the impact of federal regulation and legislation. "The foundation of the consumer movement in education," according to Stark, "is the right of the individual student to be safe, to be informed, to choose, and to be heard--those same rights defined by President Kennedy in his 1962 consumer message to Congress" (p. 2).

Treating the applicant for admission as a consumer who is about to "purchase" goods is a relatively new approach for administrators, yet it would seem to be expected. Programs must be accurately described, with standards for admittance reasonably objective and open to examination. In an overview of the legal aspects of educational consumerism, John Mancuso (1976) has written about the value of maintaining safeguards for the students while avoiding "clumsy or inept encroachment by the judiciary into the pedagogical process." However, he has concluded,

> . . . the time seems to have come for the judiciary to become more sensitive to the real needs and concerns of student-consumers and to fashion a legal theory which will justify adequate protections--whether that theory is based in constitutional or contract law (p. 88).

One outgrowth of efforts to treat student-consumers more equitably has been the reevaluation and revision of entrance tests, usually on the undergraduate level but of late in professional fields. For example, the Association of American Medical Colleges is currently creating a new version of the Medical College Admission Test that will more accurately predict which men and women possess the analytical skills as well as the scientific background to become competent physicians ("New MCAT Due," 1977). Among the major modifications of the MCAT are to be the following: the elimination of general information questions, the upgrading of the verbal skills section, the separation of the scientific portion into areas for the purpose of determining specific student deficiencies, and the lengthening of the total

examination time to one full day. Another venture, still in the developmental stage, is the preparation of medical board and bar examinations which more nearly reflect the content of professional school courses. Opposed by some--who believe, understandably, that such examinations are to be regarded as the distinct points of entry into the professions--the process of change is proceeding slowly. ("Teaching to the test" is hardly uncommon as O'Neil (1975) has indicated; and it may be necessary, he has observed, in order to hasten the opportunities for minorities to practice their skills. Both the American Bar Association and the American Medical Association, however, maintain that an adequate educational experience will prepare most students for the rigors of the examinations.)

As to the abolition of tests themselves--from the various admissions examinations to those of the bar and the board--much argumentative discussion has occurred. O'Neil (1975) has stated that, although the LSAT scores should not be accepted as the sole criterion of law school ability, admissions tests do predict fairly well for both minority and nonminority students. "To abandon tests and other predictors which work well for the great majority of applicants would be unwise and counter-productive" (p. 117). Hence, the solution to the difficulties of choosing applicants does not seem to lie in the rejection of quantifiable measures obtained in part by examinations.

Several prominent medical schools and colleges of law have sought to devise a systematic formula which would incorporate as many predictors of potential success as possible. Among those universities which have been making such an attempt would be Washington and California-Davis; their methods have proven to be suspect, leaving open the opportunity for legal challenges. The University of Georgia Law School has developed a heuristic model to screen applicants prior to committee decision. Variables considered include LSAT scores, GPA, quality of undergraduate institution, and extracurricular activities. Using these criteria, the admissions director ranks

applicants before more subjective factors are considered by the three persons on the committee (Watson, et al., 1973). A rather promising model for selecting medical school students has been evolving at the University of Texas Medical School at San Antonio. Robert Weisman (1973) has enumerated the many steps leading to the multivariate approach now being tested. Through an analysis of those factors which tend to be associated with able students, a better procedure has been established. The committee's model is, first of all, sufficiently explicit to reduce the possibility of charges of unfair practice. Nevertheless, the decisions rendered are arbitrary; for regardless of the model, some final judgment is necessary. The formula employed, though, uses such parameters as grade point average, a weighted average of MCAT subtests, a preliminary evaluation, a measure of the difficulty of previous academic work, other academic honors, non-academic achievements, and the impressions provided by an interview. Certainly, subjectivity cannot be said to have been eliminated, only that it is more clearly identified in the process.

A relatively new part of the selection routine for professional schools is the counseling of rejected applicants. When numerous slots existed for virtually all who were qualified, no obligation needed to be felt by committees; another school in another location would have an opening. Since "there are approximately 50,000 applicants but only about 14,500 openings in the first year class," a definite opportunity to direct the disappointed is presented ("Professional School Retreads," 1975, p. 450). Among the suggestions offered to help alleviate the problem are the following: (1) early counseling of potential rejectees, (2) investigation of reasons for rejection, (3) guidance and preparation for those unable to enter the profession of their first choice, (4) expansion of legal, medical, and scientific adjunct areas of involvement. Diekema (1972, 1974) has supplied a thorough report in two studies on the University of Illinois Medical Center's program to assist minorities in finding places of service in the health profession. Students who might otherwise

be rejected if they applied to medical schools are admitted to the Medical Opportunitie Program where encouragement is given through faculty advising, tutorial assistance, financial aid, and general counseling service. Thus, many have been guided toward socially useful and personally satisfying careers by an effective university project. This approach, according to Diekema, may be a far better solution to the needs of minorities than the immediate lowering of professional school standards.

A perceptive discussion of "reform in graduate and professional education" can be found in a recent volume by Lewis Mayhew and Patrick Ford (1974). They have noted, in their description of revised admissions policies, three major approaches: (1) a minimization of quantitative intelligence measures in favor of those which tap "originality, creative striving, and creative achievement"; (2) an increase in selectivity, almost in opposition to the first approach, which stresses a proven intellectual background; (3) an attempt to "recruit minority group members who do not meet the formal admissions criteria generally imposed." But, "this has placed graduate education in an ambivalent position and has raised the question of whether or not graduate schools should maintain their policy of selectivity" (pp. 118-19). In conjunction with the last approach, the programs for minorities at various universities are mentioned, notably those of Cornell, Illinois, Iowa, Michigan State, and Michigan. Typical is Cornell's which allows marginal minority students to be given the "benefit of the doubt" in the hope that future promise will overcome past difficulties.

Perhaps no other analysis of the ways and consequences of extending preference in admissions is as complete as that prepared by O'Neil (1975, pp. 146-61). His commentary is divided into five sections: the nature of the preferred groups and program objectives, methods of extending preference, the degree of preference shown, the duration of preference policies, university responsibilities in the adopting of such actions.

(1) Choosing only those from the usually accepted minority groups to recieve preference may be troublesome, but it remains the only alternative in O'Neil's view. Selecting "disadvantaged" whites may be appropriate but a case proving past discrimination or unequal treatment would be extremely hard to make. (Posner (1975), however, is totally opposed to the contention that race alone can be a valid indicator of previous hardship.) As to a preference for women, evidence will verify that no particular assistance is needed, only an equal opportunity to be admitted.

(2) Obviously, the doors of graduate and professional schools cannot be opened to all minority applicants; some system is essential. Each university could provide, O'Neil has reasoned, a specific number of openings for various disadvantaged groups. Other techniques would include: "adjusting" admissions test scores, providing summer improvement workshops (Justice Douglas has advocated a similar program which is in effect in several institutions), allowing minority applicants to enter on a conditional basis.

(3) If goals are to be set for admissions purposes, on what grounds should they be established? Here O'Neil would carefully examine minority participation in the professions, local and regional population characteristics, and unique institutional missions and abilities in order to prevent flexible goals from becoming absolute quotas.

(4) It is to be hoped that preferential admissions policies will not have a long life span. But until elementary and secondary programs for minorities improve, the educational preparation of many black, Indian, and Mexican-American applicants will be inadequate for advanced study. Once, however, more minority doctors, lawyers, and scientists rise in the professional hierarchy the programs can be gradually phased out.

(5) To be truly effective, O'Neil has asserted, universities must do more than admit minority applicants--other policies must change as well. Information about preference programs should be widely disseminated; standardized tests must be

constantly examined and revised as required; students should be encouraged to complete their studies and given financial and educational aid when needed (the attrition rate for minorities in profession programs is quite high); graduation standards should be made ascertainable and fair, but should not be lowered; societal conditions which breed inequality should be reduced through the efforts of academic institutions. According to O'Neil (1975),

> . . . one must not lose sight of the ultimate goal . . . to achieve equality for persons and groups to whom equality has long been denied--originally in obvious ways, later through subtler devices . . . what is sought is a more even distribution of burdens and benefits throughout our pluralistic society (pp. 160-61).

Those who take issue with O'Neil's recommendations could perhaps agree with the dissent of Justice Douglas in DeFunis: "The consideration of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination . . . there is no constitutional right for any race to be preferred" (p. 1714). Yet Douglas would himself suggest other relevant factors which could be taken into account and would justify admitting minority applicants separately, if not "preferentially."

Even as O'Neil has described the obligations of universities in overcoming past racial discrimination in admissions, Bernice Sandler (1975) has in like manner discussed eliminating sexual bias on the campus. In particular, (1) policies should ensure that admission criteria are not discriminatory on the basis of sex; (2) recruiting for programs must be monitored to continuously evaluate procedures; (3) data should be collected on sex and race of applicants, and additional information on marital and family status could be examined in searching for possible sex-based discrimination; (4) applicants should be queried about the fairness of the admissions program; (5) "institutions might explore provisional admissions status" for those women who might not be accepted under the general program standards but who might succeed in their studies if given the opportunity (pp. 210-12). Reasonable

progress may well be occurring: according to the Association of American Medical Colleges ("Applications Dip Slightly," 1977) women are more likely to be accepted, 38 to 35.7 percent, to medical school than men, although the total number of women admitted is substantially less.

To mitigate the chance of unfavorable litigation following a denial of admission, D. Brock Hornby (1975) has recommended these specific policy requirements:

(1) Written (ascertainable) standards should be developed which will be uniformly applied to all applicants. The treatment of exceptional cases must similarly be described in full. Class opening cutoff points and other factors of interest to prospective students should be given. Contracts may be one alternative to answer the question of equitable program requirements.

(2) Supporting evidence should be gathered to show the validity of the admissions standards. Goals and policies which are produced should clearly reflect the overall mission of the institution. National tests, if they are used, should be closely tied to local measures of ability.

(3) Every opportunity should be provided to applicants to demonstrate personal capabilities. Interviews should be encouraged whenever possible.

(4) Notices of rejection with a relatively detailed explanation of reasons for such denial should be promptly sent. If another application for admittance may be made, the time and conditions should be stressed.

(5) Access to detrimental information should be given to the rejected applicant in accordance with the prevailing law on open records.

(6) If it can be arranged, an informal hearing may be granted the applicant who has been denied admission. At this time, additional information may be introduced to refute the committee's decision.

In the study of Gellhorn and Hornby prepared for the Virginia Law Review (1974), the first five actions could be deemed minimum constitutional requirements while the

sixth may be thought of as but a recommendation, "although it is arguably within the scope of what the Supreme Court might assert due process requires" (p. 1010). Mayhew and Ford (1974) have echoed this concern for ensuring that sufficient information is acquired on each applicant and that assessing the validity of standards be a continual process; in this way, the university is protecting itself as best it can.

There is yet another consideration which must be mentioned: the movement toward centralization of higher education planning and policy-making. In the words of D. Kent Halstead (1974):

> Statewide coordination of admission to public colleges and universities is necessary in order to consider deliberately and structure, within a total system context, distribution of student enrollments, allocation of programs among institutions, and guidelines for student transfers (p. 231).

Conclusion

As to what will be the ultimate effect of the involvement of the courts with the admissions process is probably beyond even the most talented Nostradamus in the academe. Without question, however, a greater concern for detailed records on the part of committees is suggested. If the demand for professional education continues unabated--with additional pressure from minorities and women for class openings--the problems for administrators may be virtually impossible to solve. Being fair to all parties will surely be precluded by the sheer number of applicants. Allan Ornstein (1976) has commented that "qualified minorities and women are already becoming uneasy about quotas; they are aware that it puts the 'less qualified' stamp on them by association" (p. 17).

In The Chronicle of Higher Education for February 22, 1977, yet another difficulty is related: "Black Graduate Schools Caught in Critical Dilemma--They cheer white institutions' emphasis on programs for minority students but fear their own programs face mediocrity or extinction as a result" (Jacobson, 1977, p. 1).

Black schools are not sharing in the abundance of federal programs for minorities as many potential students are choosing larger, racially-mixed institutions.

Can a balance between the rights guaranteed both minority and nonminority Americans be maintained? Moreover, can justice prevail even if the "right" at issue--graduate or professional school attendance--is regarded as a "privilege"? Other questions appear as well: Is place of residence significant? Do tests actually perpetuate unjustified discrimination? Should judicial rulings and legislation determine campus policies? Furthermore, will universities be obligated to advance "special" students through programs and into professional positions, as has been advocated by some?

On the one hand, DeFunis and Bakke, together with a host of other cases, may have exacerbated an already problematic situation. But, on the other hand, several fundamental issues which should be investigated are receiving attention. Who can receive the benefits of graduate and professional education? Who should? Who will?

SOURCES CONSULTED

Abarbanel, Karin. "Is a Relapse Ahead for Minority Medical Education?" Foundation News 17 (November/December 1976): 11-28.

Anderson, Raymond. "GREB Study of Graduate Admissions and Financial Aid Policies--What Next?" College and University 47 (Summer 1972): 538-44.

"Applications Dip Slightly at Medical Schools." The Chronicle of Higher Education 14 (March 21, 1977): 2.

Bowen, Howard. "Higher Education: A Growth Industry?" Educational Record 55 (Summer 1974): 147-58.

Bowman, David, and Slagle, Allen. "The Case Against Limiting Enrollment in Teacher Education." Phi Delta Kappan 57 (June 1976): 689.

Boylan, Hunter. "Facilitating Minority Admissions: Some Legal Considerations." College and University 48 (Spring 1973): 171-76.

Brown, Giles, and Gregg, James. "Traditional vs Nontraditional Graduate Admissions." College and University 48 (Summer 1973): 476-92.

Buffkins, Archie. "Recruiting Minority Students." College and University 51 (Summer 1976): 420-27.

Caldwell, Wallace. "The Changing Legal Relationships Between Students and Universities." College and University 45 (Spring 1970): 245-65.

"Califano Admits Error in Advocating Quotas." Higher Education and National Affairs 26 (April 1, 1977): 8.

Carnegie Commission on Higher Education. Higher Education and the Nation's Health: Policies for Medical and Dental Education. New York: McGraw-Hill, 1970.

"The Carnegie Council and Affirmative Action." Society 13 (January/February 1976): 6-8.

Carnegie Council on Policy Studies in Higher Education. Making Affirmative Action Work in Higher Education: An Analysis of Institutional and Federal Policies with Recommendations. San Francisco: Jossey-Bass, 1975.

Cohen, Carl. "Race and the Constitution." Nation 220 (February 8, 1975): 135-45.

Davis, Bernard. "Academic Standards in Medical Schools." New England Journal of Medicine 294 (May 13, 1976): 1118-119.

Diekema, Anthony. "The Medical Opportunities Program Revisited: An Assessment of Admission, Enrollment and Retention of Minority Students in Health Professional Schools." College and University 50 (Fall 1974): 60-75.

_____, and Hilton, William. "The Medical Opportunities Program: An Approach Toward Increasing Minority Enrollments in Health Professional Schools." College and University 47 (Spring 1972): 201-10.

Duffy, John. The Healers: The Rise of the Medical Establishment. New York: McGraw-Hill, 1976.

Ely, John. "The Constitutionality of Reverse Racial Discrimination." University of Chicago Law Review 41 (Summer 1974): 723-41.

Feldman, Saul. Escape from the Doll's House: Women in Graduate and Professional School Education. New York: McGraw-Hill, 1974.

Fiss, Owen. "The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after Brown v. Board of Education." University of Chicago Law Review 41 (Summer 1974): 742-73.

Fuerst, J. S. "Quotas as an Instrument of Public Interest." Society 13 (January/February 1976): 11, 18-21.

Gellhorn, Ernest, and Hornby, D. Brock. "Constitutional Limitations on Admissions Procedures and Standards--Beyond Affirmative Action." Virginia Law Review 60 (October 1974): 975-1011.

Glazer, Nathan. Affirmative Discrimination: Ethnic Inequality and Public Policy. New York: Basic Books, 1975.

"Graduate Admissions--Perspectives on the Use of Selection Criteria." College and University 49 (Summer 1974): 607-16.

Graglia, Lino. Disaster by Decree: The Supreme Court Decisions on Race and the Schools. Ithaca, New York: Cornell University Press, 1976.

Greenawalt, Kent. "Judicial Scrutiny of 'Benign' Racial Preference in Law School Admissions." Columbia Law Review 75 (April 1975): 559-602.

Greenberg, Daniel. "An Uproar in the Medical Schools." The Chronicle of Higher Education 13 (January 17, 1977): 7.

Griswold, Erwin. "Some Observations on the DeFunis Case." Columbia Law Review 75 (April 1975): 512-19.

Halstead, D. Kent. Statewide Planning in Higher Education. Washington, D.C.: Government Printing Office, 1974.

Hanson, David, and Liethen, Michael. "Legal Background: Nonresident Tuition and Constitutional Law." In Alternative Tuition Systems, pp. 101-10. Edited by Robert Carbone. Iowa City, Iowa: American College Testing Program, 1974.

"Harvard President Criticizes Court Decision in Bakke Case." Phi Delta Kappan 58 (February 1977): 515.

Havighurst, Robert. "Individual and Group Rights in a Democracy." Society 13 (January/February 1976): 13, 25-28.

Henkin, Louis. "DeFunis: An Introduction." Columbia Law Review 75 (April 1975): 483-94.

Herndon, Terry. "The 'Case Against' Is a Poor One." Phi Delta Kappan 57 (June 1976): 689, 704.

Hobbs, Walter. "Academic Departments and the Law." In Examining Departmental Management, pp. 99-114. Edited by John Smart and James Montgomery. San Francisco: Jossey-Bass, 1976.

Hook, Sidney, and Todorovich, Miro. "The Tyranny of Reverse Discrimination." Change 7 (Winter 1975-76): 42-43.

Horle, Reid, and Thompson, John. "Legal and Political Implications of Policies Governing Admission to Publicly Supported Institutions of Higher Education." College and University 43 (Spring 1968): 274-85.

Hornby, D. Brock. "Implications of the DeFunis Case for Undergraduate Admissions." Liberal Education 61 (May 1975): 216-26.

Hughes, Everett, et al. Education for the Professions of Medicine, Law, Theology, and Social Welfare. New York: McGraw-Hill, 1973.

Jacobson, Robert. "Black Graduate Schools Caught in Critical Dilemma." The Chronicle of Higher Education 13 (February 22, 1977): 1, 8.

_____. "Discrimination." The Chronicle of Higher Education 14 (March 21, 1977): 6-7.

Kaplan, John. "Plessy and Its Progeny." Northwestern University Law Review 58 (May-June 1963): 157-214.

Karst, Kenneth, and Horowitz, Harold. "Affirmative Action and Equal Protection." Virginia Law Review 60 (October 1974): 955-74.

Kinsman, Robert. "Graduate Admissions Problems." College and University 49 (Summer 1974): 600-706.

Kirp, David, and Yudof, Mark. "DeFunis and Beyond." Change 6 (November 1974): 22-26.

Laudicina, Robert, and Tramutola, Joseph, eds. A Legal Overview of the New Student as Educational Consumer, Citizen, and Bargainer. Springfield, Illinois: Charles Thomas, 1976. Ch. 2: Admissions--a Changing Marketplace, pp. 12-90.

Lavinsky, Larry. "DeFunis v. Odegaard: The 'Non-Decision' with a Message." Columbia Law Review 75 (April 1975): 520-33.

Lester, Richard. Antibias Regulation of Universities: Faculty Problems and Their Solutions. New York: McGraw-Hill, 1974.

Mancuso, John. "Legal Rights to Reasonable Rules, Fair Grades, and Quality Courses." In Promoting Consumer Protection for Students, pp. 75-88. Edited by Joan Stark. San Francisco: Jossey-Bass, 1976.

Mayhew Lewis, and Ford, Patrick. Reform in Graduate and Professional Education. San Francisco: Jossey-Bass, 1974.

Meuser, Mike. "Jobs in Law: By 2000 We'll Have Too Many Lawyers, but There Are Alternatives for Graduates." Kentucky Kernel (January 19, 1977): 1, 6.

Millett, John. "The Public Interest in Graduate Education." Educational Record 55 (Spring 1974): 79-86.

"New MCAT Due." Change 9 (February 1977): 53.

Nickel, James. "Preferential Policies in Hiring and Admissions: A Jurisprudential Approach." Columbia Law Review 75 (April 1975): 534-58.

O'Neil, Robert. Discriminating Against Discrimination: Preferential Admissions and the DeFunis Case. Bloomington, Indiana: Indiana University Press, 1975.

_____. "Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education." Yale Law Journal 80 (March 1971): 699-767.

_____. "Racial Preference and Higher Education: The Larger Context." Virginia Law Review 60 (October 1974): 925-54.

Orlans, Harold. "The Fatuity of Credentialing Everyone and Everything." In Formulating Policy in Postsecondary Education, pp. 272-83. Edited by John Hughes and Olive Mills. Washington, D.C.: American Council on Education, 1975.

Ornstein, Allan. "Quality, not Quotas." Society 13 (January/February 1976): 10, 14-17.

Packer, Herbert, and Ehrlich, Thomas. New Directions in Legal Education. New York: McGraw-Hill, 1972.

Paulsen, Monrad. "DeFunis: The Road Not Taken." Virginia Law Review 60 (October 1974): 917-24.

Pollak, Louis. "DeFunis Non Est Disputandum." Columbia Law Review 75 (April 1975): 495-511.

Posner, Richard. "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities." In The Supreme Court Review 1974, pp. 1-32. Edited by Philip Kurland. Chicago: University of Chicago Press, 1975.

"Professional School Admissions and Records." College and University 51 (Summer 1976): 501-03.

"Professional School Retreads and Alternate Occupations." College and University 50 (Summer 1975): 449-56.

"Reverse Discrimination Again Laid to Davis." The Chronicle of Higher Education 12 (August 4, 1975): 2.

Ringer, Benjamin. "Affirmative Action, Quotas, and Meritocracy." Society 13 (January/February 1976): 12, 22-25.

Roberts, Sylvia. "Equality of Opportunity in Higher Education: Impact of Contract Compliance and the Equal Rights Amendment." Liberal Education 59 (May 1973): 202-16.

Sandler, Bernice. "Sex Discrimination, Admissions in Higher Education and the Law." College and University 50 (Spring 1975): 197-212.

"Schools and Colleges--Discrimination." United States Law Week 45 (October 5, 1976): 2179-80.

Sherman, Malcolm. "Anti-Intellectualism and Civil Rights." Change 8 (December 1976): 34-40.

Siegel, S. R., and Schmitt, E. W. "The Effect of Years of Interruption on ATGSB Scores for Applicants to MBA Programs." College and University 51 (Winter 1976): 193-99.

Stark, Joan. "The Emerging Consumer Movement in Education." In Promoting Consumer Protection for Students, pp. 1-8. Edited by Joan Stark. San Francisco: Jossey-Bass, 1976.

Stencel, Sandra. "Reverse Discrimination." Editorial Research Reports II (August 1976): 63-80.

Watkins, Beverly. "Reverse-Bias Lawsuit Shakes University of California." The Chronicle of Higher Education 14 (April 4, 1977): 1, 4.

Watson, Hugh, Anthony, Ted, and Crowder, William. "A Heuristic Model for Law School Admissions Screening." College and University 48 (Spring 1973): 195-204.

Weisman, Robert. "Professional Students Selection--Science or Witchcraft?" College and University 48 (Summer 1973): 493-505.

Winkler, Karen. "Graduation, Not Admissions, Urged as Desegregation Focus." The Chronicle of Higher Education 14 (March 21, 1977): 8.

Wong, William. "Reverse Discrimination Revisited." Wall Street Journal 57 (December 21, 1976): 12.

PERTINENT CASES

Bakke v. Regents of the University of California, 132 Cal. Rptr. 680 (1976)

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

DeFunis v. Odegaard, 507 P. 2d 1169 (1973), 94 S. Ct. 1704 (1974)

Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Circ., 1961), 368 U.S. 930 (1961)

Griggs v. Duke Power Co., 401 U.S. 424 (1971)

Healy v. James, 408 U.S. 169 (1972)

McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950)

Plessy v. Ferguson, 163 U.S. 537 (1896)

Roth v. Board of Regents, 408 U.S. 564 (1972)

Shapiro v. Thompson, 394 U.S. 618 (1969)

Starns v. Malkerson, 401 U.S. 985 (1971)

Sweatt v. Painter, 339 U.S. 629 (1950)

United Jewish Organizations of Williamsburgh v. Carey, 45 LW 4221

Vlandis v. Kline, 412 U.S. 441 (1973)

Washington v. Davis, 512 F. 2d 956 (1976)